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The Attorney General v Lokman Noor bin Adam

B HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO WA-44–253–10 OF 2019
COLLIN SEQUERAH J
28 JANUARY 2020

C *Civil Procedure — Contempt of court — Interference with due administration of justice — Respondent in video interview allegedly threatened witness testifying in on going criminal trial — Whether respondent's action also deterred other witnesses from coming forth to testify — Whether it was wrong of Malaysian Anti-Corruption Commission to have issued notice to respondent to show cause why* D *contempt action should not be taken against him — Whether only court had the power/jurisdiction to issue the said notice — Whether if contempt was not committed in face of court any party who had sufficient interest in matter could initiate contempt proceedings against contemnor — Whether court itself could also initiate the contempt proceedings*

E

The Malaysian Anti-Corruption Commission ('MACC') had issued the respondent with a notice to show cause why contempt proceedings should not be taken against him for, allegedly, threatening a witness in an on going criminal trial both in a video interview he had given and in a police report he F had lodged. It was alleged that the respondent's actions also constituted a threat to other witnesses coming forward to testify at the trial. Following the expiry of the show cause notice, the applicant ('the AG') successfully obtained an ex parte order of court granting him leave to commence committal proceedings against the respondent. In his instant appeal against the granting of the order, G the respondent raised various arguments including that: (a) only the court had the power/jurisdiction to issue the show cause notice under O 52 r 2B of the Rules of Court 2012 ('r 2B') and not the MACC; (b) the show cause notice was not a step by step procedure but should have been issued together or simultaneously with the AG's ex parte leave application; (c) the cause papers in H the leave application were defective for not referring to s 13 of the Courts of Judicature Act 1964 ('the CJA') in their intitulement; and (d) the statement under O 52 r 3(2) in support of the AG's leave application was defective for not giving sufficient particulars of material facts. The AG replied that the omission to mention s 13 of the CJA in the cause papers did not mislead or prejudice the I respondent because they had cited art 126 of the Federal Constitution which repeated the exact same words as in s 13. The AG said the show cause notice did not necessarily have to be issued by the court and that the purpose of the notice was to allow the respondent reasonable opportunity to respond before committal proceedings for contempt were filed.

Held, dismissing the respondent's application to set aside the ex parte leave order:

(1) Since the jurisdiction of the court was only invoked at the stage when application for leave to file committal proceedings was made under O 52 r 3 of the ROC, it followed that the notice to show cause under r 2B might be issued by a party other than the court itself. Although r 2B had yet to be enacted at the material time, the case of *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193 suggested that in cases where contempt was not committed in the face of the court, either the AG or any private party who had sufficient interest in the matter might initiate the contempt proceedings. Therefore, the notice to show cause under r 2B might be issued by a party other than the court although the court itself was not precluded from initiating such action. If the Rules Committee had intended for the show cause notice under r 2B to be issued and initiated only by the court it would have said so in no uncertain terms (see paras 43–44 & 46–47).

(2) The procedure from r 2B onwards was intended to be a step by step procedure. The notice to show cause under r 2B had to be served first before application to court for leave to commence committal proceedings was made under r 3 (see para 42).

(3) The statement under O 52 r 3 was not defective as the facts and nature of the alleged contempt was sufficiently particularised and brought to the respondent's notice such that he was not prejudiced (see paras 48–51).

(4) The omission to mention s 13 of the CJA in the cause papers was not fatal and did not prejudice the respondent since the cause papers had cited art 126 of the Federal Constitution which not only contained the same words as s 13 but was also the source of the court's power to punish for contempt (see paras 53–56).

[Bahasa Malaysia summary

Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM') telah mengeluarkan notis kepada responden untuk tunjuk sebab kenapa prosiding penghinaan tidak patut diambil terhadapnya kerana, dikatakan, mengancam saksi dalam perbicaraan yang sedang berjalan dalam kedua-dua wawancara video yang telah diberikannya dan dalam laporan polis yang telah dibuat olehnya. Ia dikatakan bahawa tindakan responden juga merupakan ancaman kepada saksi lain yang ke hadapan untuk memberi keterangan semasa perbicaraan. Berikutan tamatnya notis tunjuk sebab itu, pemohon ('AG') telah berjaya memperoleh perintah ex parte mahkamah yang memberikannya kebenaran memulakan prosiding komital terhadap responden. Dalam rayuannya ini terhadap pemberian perintah itu, responden menimbulkan pelbagai hujah termasuk: (a) hanya mahkamah mempunyai kuasa/bidang kuasa untuk mengeluarkan notis tunjuk sebab di bawah A 52 k 2B Kaedah-Kaedah

Mahkamah 2012 ('k 2B') dan bukan SPRM; (b) notis tunjuk sebab bukan prosedur langkah demi langkah tetapi hendaklah dikeluarkan bersama atau serentak dengan permohonan kebenaran ex parte AG; (c) kertas kausa dalam permohonan kebenaran adalah cacat kerana tidak merujuk kepada s 13 Akta Mahkamah Kehakiman 1964 ('AMK') dalam tajuknya; dan (d) kenyataan di bawah A 52 k 3(2) yang menyokong permohonan kebenaran AG adalah cacat kerana tidak memberikan butiran mencukupi fakta yang material. AG menjawab bahawa peninggalan untuk menyatakan s 13 AMK dalam kertas kausa tidak mengelirukan atau menjejaskan responden kerana mereka telah memetik perkara 126 Perlembagaan Persekutuan yang mengulangi kata-kata yang sama sepertimana dalam s 13. AG mengatakan notis tunjuk sebab itu tidak semestinya dikeluarkan oleh mahkamah dan bahawa tujuan notis itu adalah untuk membenarkan responden peluang munasabah untuk menjawab sebelum prosiding komital untuk penghinaan difailkan.

Diputuskan, menolak permohonan responden untuk mengetepikan perintah ex parte:

(1) Oleh kerana bidang kuasa mahkamah hanya digunakan di peringkat apabila permohonan untuk kebenaran memfailkan prosiding komital dibuat di bawah A 52 k 3 KM, ia diikuti bahawa notis untuk tunjuk sebab di bawah k 2B boleh dikeluarkan oleh pihak selain mahkamah sendiri. Walau pun k 2B belum digubal pada masa matan, kes *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193 mencadangkan bahawa dalam kes-kes di mana penghinaan tidak dilakukakn di muka pengadilan, sama ada AG atau mana-mana pihak persendirian yang mempunyai kepentingan yang mencukupi dalam perkara itu boleh memulakan prosiding penghinaan itu. Oleh itu, notis untuk tunjuk sebab di bawah k 2B boleh dikeluarkan oleh pihak selain daripada mahkamah meskipun mahkamah sendiri tidak dihalang daripada memulakan tindakan tersebut. Jika Jawatankuasa Kaedah-Kaedah berniat untuk notis tunjuk sebab di bawah k 2B dikeluarkan dan dimulakan hanya oleh mahkamah ia akan mengatakan sedemikian dengan tegas (lihat perenggan 43–44 & 46–47).

(2) Prosedur dari k 2B dan seterusnya bertujuan untuk menjadi prosedur langkah demi langkah notis untuk tunjuk sebab di bawah k 2B perlu disampaikan terlebih dahulu sebelum permohonan kepada mahkamah untuk kebenaran memulakan prosiding komital dibuat di bawah k 3 (lihat perenggan 42).

(3) Kenyataan di bawah A 52 k 3 tidak cacat kerana fakta dan sifat penghinaan yang dikatakan cukup dikhususkan dan dibawa kepada perhatian responden agar dia tidak diprejudiskan (lihat perenggan 48–51).

(4) Peninggalan untuk menyatakan s 13 AMK dalam kertas kausa tidak

memudaratkan dan tidak memprejudiskan responden kerana kertas kausa telah memetik perkara 126 Perlembagaan Persekutuan yang bukan sahaja tidak mengandungi kata-kata yang sama seperti s 13 tetapi juga adalah punca kuasa mahkamah untuk menghukum untuk penghinaan (lihat perenggan 53–56).]

Cases referred to

Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors [1986] 2 MLJ 193, SC (refd)

Lee Chan Leong v Jurutera Konsultant (SEA) Sdn Bhd & Ors [2002] 3 MLJ 718; [2002] 4 CLJ 1, CA (refd)

Tan Boon Thien & Anor v Tan Poh Lee & Ors [2019] MLJU 1970 ; [2020] 3 CLJ 28, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 13
Federal Constitution art 126
Rules of Court 2012 O 52 rr 2B, 3, 3(2)

Gopal Sri Ram (Ahmad Akram bin Gharib, Mohamad Mustaffa bin P Kunyalam, Deepa Nair Thevaharan and Nadia Mohd Izhar with him) (Public Prosecutor, Attorney General's Chambers) for the applicant.

Muhammad Shafee Abdullah (Wan Aizuddin Wan Mohammed and Rahmat Hazlan with him) (Shafee & Co) for the respondent.

Collin Sequerah J:

INTRODUCTION

[1] This is the respondent's application to set aside the ex parte order granted by this court on 22 October 2019 granting leave to the honourable attorney general ('applicant') to commence committal proceedings against the respondent.

BACKGROUND FACTS

[2] On 1 October 2019, the respondent received a notice to show cause why he should not be committed to prison or fined for contempt. The said notice to show cause was dated 30 September 2019 under the letterhead of 'Bahagian Perundangan dan Pendakwaan, Ibu Pejabat Suruhanjaya Pencegahan Rasuah Malaysia' or MACC and signed by deputy public prosecutor Encik Mohamad Mustafa bin P Kunyalam.

[3] The alleged contempt was with respect to a video interview given by the respondent on 25 September 2019 and a police report lodged by him on the

same date wherein the respondent by those acts had expressly or impliedly threatened a witness by the name of Datuk Amhari Effendi Nazaruddin who was a witness in Arrest Cases No WA-45–7–11 of 2018 and WA-45–8–11 of 2018 (*Public Prosecutor v Mohd Najib bin Hj Abdul Razak*), which is an ongoing proceeding before the Kuala Lumpur High Court.

[4] It was further contended by the applicant that the said acts also constituted a threat to witnesses coming forward to give evidence in the aforesaid arrest cases.

[5] The respondent replied to the said notice of motion through his previous solicitor in a letter dated 8 October 2019. The pertinent contents of this letter were as follows:

(a) MACC has no power or jurisdiction to issue the said notice to show cause; and

(b) the allegations in relation to his actions and what was said by the respondent in the notice to show cause is unreasonable.

[6] Thereafter the applicant filed a notice of motion on 15 October 2019 seeking leave to commence committal proceedings against the respondent. The notice of motion was filed together with an affidavit in support affirmed by Abd Hamid Ibrahim dated 14 October 2019 and a statement pursuant to O 52 r 3(2) of the Rules Of Court 2012 ('the ROC') dated 21 October 2019.

[7] Ex parte leave was granted by this court on 22 October 2019. The respondent subsequently was served with the following cause papers by the applicant:

(a) notice of application dated 24 October 2019 (encl 9);

(b) applicant's affidavit in support dated 14 October 2019;

(c) statement under O 52 r 3(2) Rules of Court 2012; and

(d) ex parte order dated 22 October 2019.

[8] On 6 November 2019, the respondent was served with an additional affidavit in support by the applicant dated 5 November 2019.

PARTIES SUBMISSIONS

The respondent

[9] Learned counsel for the respondent raised the following four main grounds by way of their written submissions although during the course of oral arguments, these were confined to just two points.

[10] Firstly, the respondent argued that the intitulement in the cause papers were defective. This argument was premised upon the fact that the empowering provision which was omitted is s 13 of the Courts of Judicature Act 1964 ('the CJA') which reads:

> 13 Contempt
>
> The Federal Court, the Court of Appeal and the High Court shall have power to punish any contempt of itself.

[11] Secondly, it was contended that the notice to show cause issued under O 52 r 2B ('r 2B') of the ROC was defective. The respondent submitted that in the present case, the notice to show cause was issued by the Bahagian Perundangan dan Pendakwaan, Ibu Pejabat Suruhanjaya Pencegahan Rasuah Malaysia ('MACC').

[12] It was submitted that the MACC has no power nor jurisdiction to issue the notice to show cause to the respondent.

[13] It was further submitted that only the court has the power and jurisdiction to issue the notice to show cause to the respondent and call for the respondent to provide for the explanation on the alleged contemptuous action.

[14] In so arguing, the respondent placed reliance upon the case of *Tan Boon Thien & Anor v Tan Poh Lee & Ors* [2019] MLJU 1970; [2020] 3 CLJ 28which held that the notice to show cause is a mandatory requirement to be adhered to prior to the commencement of leave to commit.

[15] It was therefore contended that the notice to show cause issued against the respondent was defective for want of jurisdiction and/or power of the issuing party.

[16] It was also contended that as the requirement to issue the said notice is compulsory under the law, the respondent was highly prejudiced.

[17] It was further contended on behalf of the respondent that the notice to show cause under r 2B is not a step by step procedure but should be issued together or simultaneously with the ex parte application for leave under O 52 r 3 of the ROC.

[18] Thirdly, it was submitted that the wrong party initiated this proceeding. As the subject matter of the purported contempt relate to Criminal Trial No WA-45–7–11 of 2018 & WA-45-8-11 of 2018, *Public Prosecutor v Mohd Najib bin Hj Abd Razak* ('1MDB proceedings') which the public prosecutor is in charge of, this contempt proceeding should have been filed by the applicant in his capacity as the public prosecutor.

[19] Fourthly, the respondent took the stand that the statement under O 52 r 3(2) was defective. This was because of the following:

(a) it failed to adequately particularise details and material facts;

(b) it failed to disclose facts likely to be disputed and reasons why such dispute is not sustainable; and

(c) it was further submitted that these omissions cannot be supplemented by way of affidavit evidence.

The applicant

[20] The applicant submitted firstly that the omission to cite s 13 of the CJA was not inaccurate and did not mislead because art 126 of the Federal Constitution, which wordings are similar, and was cited in the intitulement, is to the grundnorm which is superior to the act.

[21] With regard to their second point, it was argued that r 2B was peculiar to our jurisdiction and relied on the case of *Tan Boon Thien & Anor v Tan Poh Lee & Ors* where it was held, inter alia:

> ... the Rules Committee in its wisdom enacted rule 2B with the purpose that the proposed contemnor be given the first opportunity of answering to the notice to show cause before any application for leave is made.

[22] As the contemnor here was given reasonable opportunity to provide an explanation which is the purpose of r 2B, there was no merit to the argument by the respondent.

[23] It was also submitted that the notice to show cause in r 2B need not be issued by the court. It was likened to a notice before action. The court's role only commences when the application under r 3 is made.

[24] The third point taken up by the applicant was the statement under O 52 r 3(2) was not defective because it makes reference to the contemptuous act of the contemnor and sufficiently describes it.

[25] It was submitted that the english transcript had been produced and the statement sufficiently particularises the charge while the affidavit produces the actual transcript.

[26] In the circumstances, it was submitted that the contemnor had suffered no substantial injustice or prejudice.

[27] The next point advanced by the applicant was that it was settled law that the attorney general is the proper person to commence contempt proceedings relying on the judgment of the Supreme Court in *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193.

[28] It was therefore submitted that the argument to the contrary by the respondent was misconceived.

ANALYSIS AND FINDINGS

[29] Although essentially four main points were raised in the written submissions, there were two points taken up by way of oral argument in these proceedings and I propose to deal with these two points first as they constituted the main plank of the respondent's arguments. There were also some subsidiary grounds canvassed.

First point

[30] The first point concerns the procedure applicable to O 52 r 2B and r 3 respectively and there are two issues to consider here namely:

(a) whether the notice to show cause under O 52 r 2B of the ROC is a step by step process or part of the ex parte leave procedure under O 52 r 3? and

(b) who can issue the notice to show cause under O 52 r 2B?

First issue

[31] The passage in the case of *Tan Boon Thien & Anor v Tan Poh Lee & Ors* quoted above and relied upon by the applicant states that the Rules Committee enacted r 2B with the purpose that the proposed contemnor be first given the opportunity of answering to the notice to show cause before any application for leave under r 3 is made.

[32] This also appears to have been borne out of the need to satisfy the requirement of natural justice in cases such as these, the absence of which was all too evident in the case of *Lee Chan Leong v Jurutera Konsultant (SEA) Sdn*

Bhd & Ors [2002] 3 MLJ 718; [2002] 4 CLJ 1, and which, I was given to understand by the learned deputy public prosecutor, in fact eventually prompted the enactment of r 2B.

[33] In that case, a notice to show cause in the form of a letter was written by a High Court judge to an advocate and solicitor requesting him to appear before him to answer why he ought not to be examined in open court in relation to a letter written by him to the Chief Judge of Malaya where he allegedly failed to set out a proper account of what had transpired before the said High Court judge.

[34] There was however no formal charge formulated and framed against the said advocate and solicitor and where it did not allege any misconduct or criminality on the part of the lawyer requiring an answer. There was also no charge set out nor did it state that if the lawyer could not satisfactorily explain his conduct, he would be punished for contempt.

[35] The learned High Court judge eventually found the said advocate and solicitor guilty of contempt and sentenced him to a fine of RM10,000 in default three months imprisonment, a further order having being made that required the fine to be paid by 1.30pm on the same day.

[36] On appeal, the Court of Appeal found that there was no cause or basis for contempt and allowed the appeal setting aside the conviction and sentence and ordered a refund of the fine paid.

[37] In *Tan Boon Thien & Anor v Tan Poh Lee & Ors* , the Court of Appeal held that the leave application should be made only after the expiry of the period that the answer (to the notice to show cause) should be given and it is only when and where there is no reply or no satisfactory explanation given that any 'ensuing action' is taken. It was held by the Court of Appeal, inter alia, as follows:

> [34] Based on the foregoing reasons we are of the considered view that r 2B requires mandatory compliance and its failure will render the subsequent proceedings invalid. *We are of the view that the Rules Committee in its wisdom enacted r 2B with the purpose that the proposed contemnor be given the first opportunity of answering to the notice to show cause before any application for leave is made*. The leave application should be made only after the expiry of the period that the answer should be given and *it is only when and where there is no reply or no satisfactory explanation given that any ensuing action is taken*. (Emphasis added.)

[38] It is evident that such ensuing action must refer to the procedure under r 3 which is the point at which the jurisdiction of the court is first invoked.

[39] It is also apposite to note that the heading or marginal note to r 3 reads, 'Application to court' which provides further impetus for the argument that the court's jurisdiction is only invoked at that stage. A

[40] The respondent's written submissions itself referred to *Tan Boon Thien & Anor v Tan Poh Lee & Ors* and to the part where it held that the notice to show cause is a mandatory requirement to be adhered to prior to the commencement of leave to commit. B

[41] Any contrary construction or interpretation would otherwise render r 2B redundant. C

[42] It is therefore clear that the procedure from r 2B onwards is intended to be a step by step procedure and that the notice to show cause under r 2B must be served first before the application for leave to court is made under r 3. D

Second issue

[43] Having held that the jurisdiction of court is only invoked at the application to court stage under r 3, it follows that the notice to show cause under r 2B may be issued by a party other than the court itself. E

[44] Although r 2B had yet to be enacted at the material time, the case of *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* suggests that in cases when contempt is not committed in the face of the court, either the attorney general or any private party who has sufficient interest in the matter may initiate the contempt proceedings. F

[45] The then Supreme Court in that case held: G

> *When the contempt is not committed in the face of the court, as is the case alleged here, it is equally important that the dignity and integrity of the court be protected and preserved, and in such cases the contempt proceedings may be initiated by motion either by the attorney general or any private party who has sufficient interest in the matter, or even by the Court itself, although in practice it seems unjust to expect the court to protect itself by being both complainant and judge, save in the unlikely event of the attorney general or the appropriate private party declining to act*. In this case, the complainants are the successful parties in the two civil appeals, from which the present contempt proceeding arose. Surely, the complainants and their advocates and solicitors have sufficient interest in this matter to give them locus standi. (Emphasis added.) H I

[46] I therefore find that the notice to show cause under r 2B may be issued by a party other than the court as was done in this case. It is also evident from that case that the court itself is also not precluded from initiating such action.

[47] Finally, I also am of the view that had the Rules Committee intended for the notice to show cause under r 2B to be only issued and initiated by the court, it would have said so in no uncertain terms.

Second point

[48] The second point taken is whether the statement under r 3 is defective and bad in law and that the applicant did not crystallise and condescend into particulars as to the substance of the contempt complained off.

[49] A perusal of the statement pursuant to r 3(2) will leave no doubt in the mind of the person to whom it was addressed that the very object and purpose of the respondent's alleged contemptuous act was to not only harass and intimidate prosecution witness ('PW8') in the ongoing trial but also other witnesses and potential witnesses who may come forward and give evidence against the accused in the case or cases mentioned.

[50] The fact that this act consisted of the video interview and the lodging of the police report against PW8 was also clearly spelt out in the statement.

[51] The fact and nature of the alleged contempt was thus sufficiently brought to the notice of the respondent and no prejudice was thereby occasioned to him.

Other issues

[52] The other issues raised in the written submissions but not canvassed during oral arguments are dealt with herein below.

Defective intitulement

[53] In their written submission, the respondent contended that the intitulement to the cause papers were defective for failure to mention s 13 of the CJA.

[54] The intitulement does however refer to art 126 of the Federal Constitution which provides as follows:

> 126 Power to punish for contempt
>
> The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

[55] As submitted by the applicant, s 13 of the CJA 1964 reproduces art 126.

[56] I also agree with the applicant that as the source of the power to punish for contempt emanates from a provision of the Federal Constitution itself which is the supreme law of the land, the omission to mention s 13 of the CJA is not fatal nor does it occasion any prejudice to the respondent.

Applicant's affidavit in support dated 14 October 2019 is defective

[57] With regard to the argument that the MACC affidavit verifying facts cannot qualify as the affidavit which verifies facts as stated in the statement under r 3(2) because the deponent has no personal knowledge of the alleged contempt, the said affidavit by Abd Hamid bin Ibrahim from the MACC states that the matters deposed to are within his personal knowledge save where otherwise stated and that he has been authorised by the attorney general to affirm the affidavit. That disposes of the argument by the respondent.

[58] The respondent also asserted that the identity of the person who recorded the video on 25 September 2019 is not ascertained, the source of information as to who obtained the video is not known and that the deponent of the affidavit in support had not deposed to seeing and hearing the video. This, it was submitted rendered the affidavit defective.

[59] However, in light of the fact that there was no dispute by the respondent that he was the person who gave the video interview and lodged the police report annexed as exh A2 of the said affidavit in support dated 14 October 2019, I do not see how this renders the affidavit defective and neither does it disclose any prejudice to the respondent.

[60] I therefore find no merit in the argument advanced by the respondent in respect of this issue.

[61] I have also considered the other subsidiary matters raised by the respondent and have found them devoid of merit.

[62] In the premises and for the reasons given aforesaid, the application by the respondent to set aside the ex parte order to commit is hereby dismissed.

Respondent's application to set aside the ex parte leave order dismissed

Reported by Ashok Kumar